

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CECIL ALEGRE ALHAMBRA,

Defendant and Appellant.

A152999

(Contra Costa County  
Super. Ct. No. 051508621)

In Cecil Alegre Alhambra’s prior appeal, we reversed one conviction, concluded the court made “several sentencing errors,” and remanded for resentencing. (*People v. Alhambra* (Mar. 14, 2017, A147665) [nonpub. opn.] (*Alhambra I.*)) Alhambra was not present at the June 2, 2017 resentencing hearing.

We conclude Alhambra’s absence from the resentencing hearing without a valid waiver constitutes federal constitutional error and that the People have not demonstrated that error was harmless beyond a reasonable doubt. We order the trial court to conduct a new resentencing hearing at which Alhambra must be present unless he waives the right pursuant to Penal Code section 1193.<sup>1</sup>

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged Alhambra with 37 sexual offenses against two victims, including multiple counts of committing a forcible lewd act on a child (§ 288, subd.

---

<sup>1</sup> Statutory references are to the Penal Code. We incorporate by reference our opinion in *Alhambra I.*

(b)(1)), and aggravated sexual assault of a child (§ 269, subd. (a)(1)). In December 2015, the jury convicted Alhambra of 26 counts (counts 6 to 30 and 37). The prosecution recommended a lengthy prison sentence, comprised of aggravated, consecutive terms. Defense counsel urged the court to impose the “lowest possible term, concurrently.” In February 2016, the court sentenced Alhambra to a prison term of 138 years and 8 months, plus 340 years to life. At the sentencing hearing, the court noted the complexity of the sentencing scheme and stated, “I think the big picture is, no matter how these sentences run, I do not intend that Mr. Alhambra will ever walk a free man again.” The court found no mitigating circumstances and several aggravating circumstances, and imposed consecutive sentences.

On appeal, we reversed the conviction on count 27, and concluded the court erred by imposing determinate and indeterminate sentences on the 10 lewd act convictions (counts 6, 8, 10, 12, 14, 16, 20 and 28 to 30). (*Alhambra I, supra*, A147665.) We further determined the court erred in imposing terms of 25 years to life for counts 28, 29, and 30 because, at the time the crimes were committed, the maximum sentence was 15 years to life. We remanded for resentencing.

Counsel for the parties appeared at the June 2017 resentencing hearing. At the outset, the court stated, “I did receive a letter from Mr. Alhambra waiving his appearance here at the resentencing.”<sup>2</sup> The court directed the clerk to “file stamp it and then we’ll have it for the record.” The letter states: “I am writing to waive my presence at the resentencing of my appeal. I am aware of my rights and therefore, I want to exercise that option not to be present. I would like to request, however, that all correspondence and/or the court’s order regarding my case be sent to” an address in San Pablo. The letter is signed, “/s/ Cecil A. Alhambra[.]”

The court then stated: “So following the directions of the Court of Appeal, at

---

<sup>2</sup> The file-stamped letter was an exhibit to Alhambra’s motion for constructive filing on appeal. We augment the record on our own motion to include the letter (Cal. Rules of Court, rules 8.340(c); 8.155(a)(1)(A)), but decline to consider other exhibits offered in support of the motion because these documents were not before the trial court.

this time, the conviction on Count 27 is reversed. So he has no conviction for Count 27. . . . [¶] . . . [¶] So Count 6, 8, 10, 12, 14, and 16, as well as Count 20, I am deleting what I had declared the principal or consecutive time [im]posed—all of which had been 8 years—and imposing 25 to life for each one of those Counts. [¶] Then, for counts 28, 29, and 30, I will delete the determinate sentences of 8 years, 2 years, and 2 years, respectively, and instead impose 15 to life for each of those Counts pursuant to the opinion of the Court of Appeal.” Defense counsel did not object, and neither party offered evidence or argument. The court sentenced Alhambra to a prison term of 68 years, 8 months, plus 310 years to life.

### DISCUSSION

A defendant has a constitutional and statutory right to be present at critical stages of a criminal prosecution, including “ ‘sentencing and pronouncement of judgment.’ ” (*People v. Wilen* (2008) 165 Cal.App.4th 270, 286, 287; see also § 977, subd. (b)(1).) Section 1193 permits a defendant to waive his personal presence “in *open court* and on the record, or in a *notarized* writing” requesting “judgment be pronounced . . . in his . . . absence, and that he . . . be represented by an attorney when judgment is pronounced, and the court approves his . . . absence during the pronouncement of judgment . . . .” (§ 1193, subd. (a), *italics added*.)

Alhambra contends the court erred by resentencing him in his absence. We address the claim on the merits notwithstanding defense counsel’s failure to raise the issue at the resentencing hearing. There can be “no forfeiture of [a] claim for failure to object when express waiver is required.” (See *People v. Penunuri* (2018) 5 Cal.5th 126, 162 [counsel’s failure to object to defendant’s absence from closing argument did not forfeit claim on appeal]; *People v. French* (2008) 43 Cal.4th 36, 46–47 [no forfeiture of Sixth Amendment claim based on failure to object because express waiver was required].)

The People concede Alhambra’s letter did not waive his presence because it was not notarized, but urge us to affirm because Alhambra has not shown prejudice. The People misunderstand the standard of review. “ ‘Under the federal Constitution, error

pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23.' ” (*People v. Mendoza* (2016) 62 Cal.4th 856, 902.) This standard “requires us to reverse . . . unless the *People* can demonstrate that the error was harmless beyond a reasonable doubt.” (*People v. Reese* (2017) 2 Cal.5th 660, 671, italics added.) As we explain, the People have not satisfied their burden.

In *Alhambra I*, we reversed one conviction, concluded the court made “several sentencing errors,” and remanded for resentencing. (*Alhambra I, supra*, A147665.) “When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834; see also *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257–1258.) On remand, the court had jurisdiction to reconsider Alhambra's sentence in its entirety after correcting the errors identified in our opinion. The People acknowledge the court “could have altered some of its prior discretionary sentencing choices at resentencing.”

Our reading of the hearing transcript suggests, however, that resentencing was treated as a routine matter of minimally modifying the sentence to comply with our opinion in *Alhambra I*. Had Alhambra been present, it is possible he could have presented an argument for a reduction in his sentence, such as his rehabilitation in prison, or claimed certain aggravating factors no longer applied. Whether such an argument would have persuaded the court is not the point. The point is we simply cannot know what Alhambra might have added had he been present at resentencing. We remand so that Alhambra has that opportunity. (See *People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1417 [defendant entitled to be present at resentencing hearing]; *People v. Rocha* (2019) 32 Cal.App.5th 352, 360 [where parties and their attorneys were absent from resentencing, remand required to allow defendant to “ ‘emphasize mitigating evidence that weighed in favor of leniency’ ”].)

The People have not established the federal constitutional error was harmless beyond a reasonable doubt.<sup>3</sup> The trial court must conduct a new resentencing hearing at which Alhambra must be present, unless his waiver complies with section 1193. We express no opinion on whether the court should alter the sentence imposed after it corrects the errors identified in *Alhambra I*.

#### DISPOSITION

The June 2, 2017 order is vacated and the matter is remanded. The trial court must conduct a new resentencing hearing at which Alhambra must be present, unless his waiver complies with section 1193.

---

<sup>3</sup> Having reached this result, we need not determine whether the statutory violations are also prejudicial under the applicable standard of review.

---

Jones, P.J.

WE CONCUR:

---

Simons, J.

---

Needham, J.

A152999